Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-510

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Petitioners

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September, 1979

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v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The American Trucking Associations, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the Court of Appeals (App. A; *infra*, pp. 1a-16a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (App. B, *infra*, p. 17a) was entered on June 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 10930 of the Interstate Commerce Act, revised, 49 U.S.C. § 10930,[1] which provides, in part, that "Except when the Interstate Commerce Commission finds good cause consistent with the public interest and the transportation policy of Section 10101 of this title—(1) a person may not hold both a certificate . . . and a permit . . ., to transport property on the same route or in the same area;" authorizes the Commission to make a general prospective finding of consistency with the public interest in favor of granting all future applications for dual operating authorities?

2. If the Commission does have the authority to issue a prospective finding, has it fulfilled the prerequisite requirements, as stated by the court in *Chemical Leaman Tank Lines, Inc.* v. *United States*, 368 F. Supp. 925 (D. Del. 1973)? Further, is *Chemical Leaman* applicable to a prospective finding under Section 10930 of the Act?

3. Whether the Commission's decision has a rational basis or is it arbitrary and capricious and an abuse of its administrative discretion?

4. Has the action of the Commission abrogated the Congressional intent as stated in the legislative history of Section 10930 and as evidenced by the language of the Section?

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[1] The Act has recently been revised and codified, without substantive change. Section 10930 is the revised version of former Section 210. Former Section 210 read:

> "Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in this Act—"

5. Can the Commission abridge the rights[2] of opposing parties to participate in motor carrier proceedings by shifting the burden of proof in such cases from the applicant to the opposing party?

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act and the Code of Federal Regulations are set forth in the Appendix hereto as Appendix C, *infra*, pp. 19a-30a.

STATEMENT OF THE CASE

Section 10930 of the Interstate Commerce Act, as revised, 49 U.S.C. § 10930, forbids the holding of both common and contract carrier authority to transport property over the same routes *except* when the Interstate Commerce Commission (Commission) "finds good cause consistent with the public interest and the transportation policy of Section 10101. . ."[3]

When enacting the Motor Carrier Act in 1935, Congress recognized that the holding of dual authority by a carrier or commonly controlled carriers[4] created a situation where there exists the possibility that abuses might

---

[2] The right of interested parties to participate in proceedings before the Commission is guaranteed by Section 10328 of the revised Act, 49 U.S.C. § 10328, formerly 49 U.S.C. § 305(e) and Section 5 of the Administrative Procedure Act, 5 U.S.C. § 554(c) and has been recognized by the courts. *See*, Mississippi Barge Line Co. v. U.S., 56 F. Supp. 3 (W.D.P. 1944); Washington Marlboro & Annapolis Lines v. Public Utilities Commission, 114 F. Supp. 321 (D.D.C. 1940).

[3] Formerly 49 U.S.C. preceding §§ 1, 301, 901 and 1001 and titled the National Transportation Policy. *See*, Appendix C, p. a.

[4] The section was amended in 1940 to expand the prohibition against the holding of dual authorities to motor carriers of property under common control, 54 Stat. 919, 932 (1940).

develop.[5] Congress further recognized that there were instances in which the holding of dual authorities would be advantageous. They therefore gave the Commission the power and obligation to determine if the holding of dual authorities by a particular party was consistent with the public interest and the national transportation policy.

The Commission's policy towards granting dual authorities has altered over the years as the economic conditions and other factors have changed.[6] However, the Commission had always recognized its statutory obligation to review the circumstance of each application to determine if the holding of dual authorities in that instance would be consistent with the public interest and the national transportation policy.

By a Notice of Proposed Rulemaking and Order served October 11, 1977, (Appendix D, p. 31a), the Commission initiated Ex Parte No. 55 (Sub-No. 27)—*Dual Operations*. The proceeding had as its express purpose the implementation of proposal No. 18 (DUAL OPERATIONS) in the report of the Commission's staff task force on improving motor carrier entry regulation, dated July 6, 1977. It was anticipated that the Commission's adoption of the proposal would result in approval of future dual operations as both a common and a contract

[5] Congress feared that a carrier, serving a shipper in both a contract and a common carrier capacity would be subject to economic pressures from that shipper to grant him either rate discounts or preferred services in order to maintain its share of the shipper's traffic. Conversely, an unscrupulous carrier may be tempted to offer such rates and service for the same purpose.

[6] *See*, Delaware Express Co. v. Milford Express, Inc., 126 M.C.C. 462 (1977); Telischak Trucking, Inc., Ext.—Concrete Slabs And Beams, 92 M.C.C. 553 (1963); Complete Auto Transit, Inc., Ext.—G.M. Willow Run Plant, 81 M.C.C. 455 (1959); Block Common Carrier Application, 49 M.C.C. 651 (1949); Canada Common Carrier Application, 26 M.C.C. 563 (1940); and Nelson Extensions of Operations, 1 M.C.C. 285 (1936).

carrier which otherwise would not have been approved. It was also the purpose of the proceeding below to establish guidelines by which dual operations would be allowed to be brought into issue in a specific application case.

The views of interested parties were solicited and numerous statements of facts, views, and arguments, equally divided in favor of and opposition to the proposed rule, were filed with the Commission. ATA filed comments opposing the adoption of the rule.

The Commission's final rule in this proceeding was served April 6, 1978. *See*, Appendix D, p. 40a.

ATA filed a Petition for Review in the United States Court of Appeals for the District of Columbia Circuit on May 5, 1978. In a notice served June 29, 1978, the Commission extended the coverage of its general finding to applications involving the purchase or control of one motor carrier by another or the common control of two or more motor carriers that would result in the holding of dual certificates and to applications filed prior to the effective date of June 1, 1978.

On June 26, 1979 the Court of Appeals issued a decision affirming the action of the Commission. In affirming, the Court stated that the language of Section 10930 clearly conveys the Congressional concern that motor carriers, operating under dual authority, might engage in various abuses. It also stated that Congress had delegated to the Commission the task of assuring that such abuses do not arise. The Court found, however, that (1) the Commission had discretion to issue a prospective finding, and (2) the language of the section did not prescribe a time when the requisite "finding" must occur or the method to be used in making such a determination.

The Court then found a rational basis for the Commission's decision in a staff task force report and the

Commission's conclusion that Section 10704 of the revised Act, 49 U.S.C. § 10704, formerly Section 218 of the Act, provides a more effective method to monitor rate practices and abuses in the industry.

Finally, the Court found no denial of due process as a result of the Commission's new rules, although the Court does note that opponents of individual licensing applications will have the burden of producing some quantum of evidence as to the potential for abuse by the dual operator.

REASONS FOR GRANTING THE PETITION

The Court of Appeals' decision has had, and will have, a significant effect on the future administration and construction of the Interstate Commerce Act. Eventually, the decision will have a substantial impact on a large segment of this country's regulated carrier industry and, because of the importance of that industry, on the economy as a whole.

Traditionally, certiorari has been granted when a question rises involving the scope of authority of an administrative agency under the law,[7] or the administration or construction of a federal statute,[8] especially when the

[7] *See*, Hodgson v. Local Union 6799, United Steel Workers of America, AFL-CIO, 403 U.S. 333, 91 S. Ct. 1841 (1971); Tcherepnin v. Knight, 389 U.S. 322, 88 S. Ct. 548 (1967); and Power Reactor Devel. Co. v. International U., Etc., 376 U.S. 396, 81 S. Ct. 1529 (1961).

[8] Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S. Ct. 349 (1971); United States v. An Article of Drug, Etc., 394 U.S. 784, 89 S. Ct. 1410 (1969); F.C.C. v. Schreiber, 381 U.S. 279, 85 S. Ct. 1459 (1965); United States v. Stapf, 375 U.S. 118, 84 S. Ct. 248 (19); Porter v. Aetna Casualty and Surety Co., 370 U.S. 159, 83 S. Ct. 1231 (1962); United States v. Oregon, 366 U.S. 643, 81 S. Ct. 1278 (1961); and United States v. Hougham, 346 U.S. 310, 81 S. Ct. 13 (1960).

future application of the statute by an administrative agency or department is involved.[9]

1. This case clearly involves questions, not only of the scope of the Interstate Commerce Commission's authority under the law, but also its administration and future application of that authority. Inasmuch as the Court of Appeals has ascribed more than the proper authority to the Commission to make prospective findings under the Act, certiorari should be granted. Unless this Court reverses the Court of Appeals' error, the challenged decision will continue as erroneous precedent that the Commission has unlimited authority under the rationale of *Chemical Leaman Tank Lines, Inc.* v. *United States*, 368 F. Supp. 925 (D. Del. 1973). Already, petitioner has seen this decision blindly cited by the Commission and other deregulation proponents before the United States Court of Appeals for the Fifth Circuit in *Bonney Motor Express, et al.* v. *United States*, No. 79-1293 and *Mercury Motor Express and A.T.A.* v. *United States*, No. 79-1052 as well as in the District of Columbia Circuit in *American Trucking Associations, Inc.* v. *United States*, No. 78-2260.

The Court of Appeals failed to see through the shroud placed by the Commission around its action. The Court failed to distinguish between the limited authority of the Commission to issue a general prospective finding as recognized in *Chemical Leaman* and the *carte blanche* power asserted here by the Commission to issue general prospective findings.

The Court of Appeals cites the general conclusions reached by the three-judge district court in *Chemical*

[9] I.C.C. v. Atlantic Coast Line R. Co., 383 U.S. 576, 86 S. Ct. 1000 (1966); *also*, United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392, 85 S. Ct. 1517 (1965); Federal Power Commission v. Hunt, 376 U.S. 515, 84 S. Ct. 861 (1964); and Turnbow v. C.I.R., 368 U.S. 337, 82 S. Ct. 353 (1961).

Leaman, but ignores the limits placed by that court on the agency's authority.

The prospective finding approved in *Chemical Leaman* involved a general prospective finding of public convenience and necessity in regards to the issuance of a master certificate authorizing any motor carrier desiring to transport "waste" commodities in furtherance of "a recognized pollution control program" upon a finding of fitness. The court upheld the Commission's use of rulemaking in the specific circumstances under Sections 10921 and 10922 [10] of the revised Act, 49 U.S.C. §§ 10921 and 10922, but placed both qualifications and limitations on the use of general prospective findings by the Commission. Regardless of how limited or unlimited the Commission's power to issue prospective rules is under Sections 10921 and 10922, the power clearly does not extend to the findings of conformity as required by Section 10930 which require the examination of the specific circumstances involved. The Court of Appeals failed to recognize this distinction or the limitations stated in *Chemical Leaman.*

The Court of Appeals also failed to heed the finding of the court in *Chemical Leaman* that, in order to make a general finding, the Commission must first find that all the requirements of the section are met. In *Chemical Leaman*, the Commission was required to make a finding that the public convenience and necessity standard would be met in all situations to be covered by the master certificate being issued. In the current instance, the Commission has failed to make a finding that *all* future applications for dual authorities will be consistent with the public interest and the national transportation policy. In fact, the Commission has arbitrarily made the decision not to look at the issue unless a substantial quantum of evidence is produced by protestants to prove otherwise. Thus, even if *Chemical Leaman* allows a general prospective under Section 10930, the Commission has not met the minimum standards required pursuant to the section to so make one.

[10] Formerly Sections 206 and 207 of the Act.

The Court of Appeals also ignored the explanation of the court in *Chemical Leaman* that:

> Nationwide rulemaking, we concede, may often be a less sensitive tool than individual adjudication for measuring the adverse conditions that Congress feared in the motor carrier industry. A nationwide finding, we submit, may lessen protection against abuses. . .

We can think of no more appropriate instance than the current one in which to apply this warning. Section 10930 is intended expressly to prevent a specific abuse feared by Congress—one feared enough to merit the imposition by Congress on the Commission of a specific requirement to make a finding that such authorities can be held consistent with the public interest and the national transportation policy. A nationwide finding, as recognized by *Chemical Leaman* court, cannot possibly suffice to protect the public against such abuses.

2. The Court of Appeals has also erred in finding that there was a rational nexus on which to base the Commission's rule. The Court cites two grounds of "apparently greatest importance" to justify its prospective general finding: (1) the finding by the Commission's staff that rate discrimination as practiced by operators is virtually non-existent within the industry, and 2) the staff conclusion that Section 10704 provides a more effective method to monitor rate practice and abuses in the industry.[11] The first is based not on an investigation of the rate practices of carriers holding dual authorities

[11] Decision, p. 15, Appendix A, p. 15a.

but on mere conclusions drawn by headquarters based members of the Commission's staff. The conclusion rests in part on the paucity of prosecution by the Commission for such violations! And as with the Commission's second conclusion, it ignores the simple fact that Section 10930 was intended to *prevent* such abuses from occurring, and has done just that. The Court permitted the effectiveness of the section to be used as a basis for its administrative recision and ignored the fact that the rationale offered did, in fact, counter the clearly stated Congressional purpose of the section.[12]

The Court of Appeals, in its desire to affirm the action of the Commission, has misconstrued the intent of Congress in enacting Section 10930. The Commission was delegated the authority and responsibility to assure that dual operating authorities are granted only in instances when the holding thereof would be consistent with the public interest and the national transportation policy. Congress clearly intended the granting of such rights to be an *exception* to its general statement that "a person may not hold both a certificate . . . and a permit. . . ." Congress did not intend Section 10930 to act as a device by which the Commission would monitor rate practices and abuses within the industry. Section 10704 was not adopted with the intent to repeal Section 10930, but to complement it and offer the public further protection against the feared abuses.

3. Finally, the Court of Appeals also has erred in holding that the Commission's action will not deny due

[12] Even the Court, however, did not accept the third, and perhaps most controlling reason offered by the Commission for adopting the rules in question—the desire to reduce its regulatory workload and ease the burden on its staff. While this may be an admirable goal for an administrative agency to achieve, it cannot be the basis for nullifying an Act of Congress and abandoning its regulatory responsibilities. *See*, Central Florida Enterprises, Inc. v. F.C.C., 598 F.2d 37, 58 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 2189 (1979).

process to protestants in application proceedings involving dual operations. The Court's finding that protestants will only have the burden of producing "some quantum of evidence" as to the potential for abuse by the dual operator ignores the fact that evidence to be required of the protestants is in fact solely within the possession of the applicant and its supporting shipper(s) and is not accessible to the protestants. It is a general doctrine of evidence that where the facts in regards to an issue lie peculiarly in the possession of one party, it is unfair to place the burden of producing those facts on the other party. *See, Trans-American Van Service, Inc.* v. *United States*, 421 F. Supp. 308, 331 (N.D. Tex. 1976).

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1979

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1407

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Petitioner

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents

CRETE CARRIER CORPORATION,
CONTRACT CARRIER CONFERENCE,
CARGO CONTRACT CARRIER CORPORATION,
LEASEWAY TRANSPORTATION CORPORATION,
WHIRLPOOL CORPORATION,
CHROMALLOY AMERICAN CORPORATION, ET AL.,
Intervenors

No. 78-1717

THE ATCHISON, TOPEKA AND SANTA FE RAILROAD
COMPANY, ET AL.,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Respondents

CHROMALLOY AMERICAN CORPORATION, ET AL.,
Intervenors

PETITIONS FOR REVIEW OF ORDERS OF THE INTERSTATE COMMERCE COMMISSION

Argued April 3, 1979

Decided June 26, 1979

Kenneth E. Siegel, with whom *Nelson J. Cooney* was on the brief, for petitioner in No. 78-1407.

James E. Sykes, a member of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of court, with whom *Robert G. Seaks* was on the brief, for petitioner in No. 78-1717.

James P. Tuite, Attorney, Interstate Commerce Commission, with whom *Mark L. Evans*, General Counsel, *Frederick W. Read, III*, Associate General Counsel, Interstate Commerce Commission, *John J. Powers, III*, Assistant Chief, and *Peter L. de la Cruz*, Attorney, Department of Justice, were on the brief, for respondents.

Daniel Joseph, with whom *Harry R. Silver* and *Edward F. Schiff* were on the brief, for intervenors Leaseway Transportation Corporation and Whirlpool Corporation in No. 78-1407.

E. Stephen Heisley and *Lester R. Gutman* were on the brief for intervenor Chromalloy American Corporation, et al. in Nos. 78-1407 and 78-1717.

Thomas A. Callaghan, Jr. and *Rick A. Rude* were on the brief for intervenor Contract Carrier Conference, Inc. in No. 78-1407.

Robert J. Gallagher was on the brief for intervenor Cargo Contract Carrier Corporation in No. 78-1407.

Rick A. Rude also entered an appearance for intervenor Crete Carrier Corporation in No. 78-1407.

Before TAMM and WILKEY, *Circuit Judges*, and CORCORAN,* *Senior District Judge* for the United States District Court for the District of Columbia.

Opinion for the Court filed by *Senior District Judge* CORCORAN.

CORCORAN, *Senior District Judge*: The petitioners [1] in these consolidated cases seek to set aside a final rule promulgated by the Interstate Commerce Commission (ICC or the Commission) on April 6, 1978, in a case styled *Dual Operations*, Ex Parte No. 55 (Sub No. 27).

The petitioners contend (1) that the Commission lacked statutory power to adopt the rule, (2) that the Commission acted arbitrarily and capriciously in adopting the rule and (3) that the rule denies the petitioners due process in that it denies them a fair hearing before the Commission. Several intervenors [2] as well as the Department of Justice and the Department of Transportation support the Commission.

We find the rule to be procedurally and substantively reasonable and within the ICC's statutory authority to adopt. Accordingly we affirm the Commission.

I BACKGROUND

A. *The Statute*

Under the Interstate Commerce Act, as amended by the Transportation Act of 1940, (the Act) [3] one may en-

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* Sitting by designation pursuant to 28 U.S.C. § 294(c).

[1] Petitioners are the American Trucking Associations, Inc. (ATA), a national organization of trucking firms; the Atchison, Topeka and Santa Fe Railway Company; and seventeen other western railroads.

[2] Intervenors are various companies engaged in motor vehicle transportation.

[3] 49 U.S.C. § 1 *et seq.* The Act has recently been revised and codified, without substantive change, and enacted as 49 U.S.C. § 10101 *et seq.* by P.L. 95-473, 92 Stat. 1337 (1978). For conven-

gage in the transportation by motor vehicle of passengers or property in interstate or foreign commerce either as a "common carrier" or a "contract carrier."

A common carrier holds itself out to the general public to perform for-hire transportation and operates under a certificate of public convenience and necessity. 49 U.S.C. § 303(14).[4] On the other hand, a contract carrier renders specialized transportation services pursuant to contracts with one customer or a limited number of customers and operates under permit from the Commission. 49 U.S.C. § 303(15).[5]

Section 210 of the Act, 49 U.S.C. § 310, is captioned "Dual Operation" and provides in pertinent part that no motor carrier may be granted authority to operate as both a common carrier and a contract carrier, i.e. to engage in dual operations, "[u]nless for good cause shown, the Commission shall find, or shall have found, that both a certificate and a permit may be so held consistently with the public interest and with the national transportation policy declared in this act. . . ."[6]

The subject of dual operations was first addressed by Section 7(c) of the so-called Rayburn Bill, H.R. 6836,

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ience, discussion in the text reflects the language of the old provisions, with cross references to the new statute provided in the footnotes where appropriate.

[4] Now codified at 49 U.S.C. § 10102(11).

[5] Now codified as 49 U.S.C. § 10102(12).

[6] Revised Section 210, now 49 U.S.C. § 10930, reads

> Except when the Interstate Commerce Commission finds good cause consistent with the public interest and the transportation policy of section 10101 of this title . . .

All parties seek comfort in the revised language, but we feel that no inference should be drawn from the change in language. This seems appropriate since the 1978 revisions were not intended to work any substantive change in the law. *See* P.L. 95-473, 92 Stat. 1466, § 3(a).

73rd Cong. 2d Sess. (1934), which proposed that dual operations be totally prohibited. However, in passing the Act, Congress chose to abandon that total ban in favor of the present flexibility of Section 210, but gave little explanation for so doing. Indeed, the entire legislative history of Section 210 is contained in the remarks of Senator Wheeler, the Act's sponsor and Chairman of the Senate Committee on Interstate and Foreign Commerce, who observed:

> This section [210] prohibits any person from holding at the same time a common carrier certificate and contract carrier permit, unless for good cause shown the Commission finds that both may be held consistently with the public interest and with the policy declared in Section 202(a). There are instances in which both types of operations can advantageously be conducted by the same operator and without prejudice to the public interest, but the possibility of abuses developing makes *it available to give the Commission the power to pass on all cases in which it is proposed to combine the two types of operations.* (emphasis supplied) 79 Cong. Rec. 5654 (1935).

B. *The Administrative Interpretation of Section 210*

In the years immediately following the passage of Section 210, the Commission granted applications for dual operations on a fairly routine basis.[7]

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[7] *See* Gittens Common Carrier Application, 4 M.C.C. 733 (1938); Salt Creek Transp. Co.—Purchase—Casey Truck Line Co., 5 M.C.C. 673 (1938); Luper Transp. Co. Contract Carrier Application, 6 M.C.C. 183 (1938); Wallace Common Carrier Application, 9 M.C.C. 451 (1938); Hale Extension—Des Moines, Iowa—Illinois, 12 M.C.C. 141 (1938); Barker Transp. Co.—Purchase—Patrykus, 5 M.C.C. 497 (1938); Schultz—Purchase—Hagen, 15 M.C.C. 13 (1938); Nelson Extensions of Operations, 1 M.C.C. 285 (1936).

However, in 1940, in considering an application for dual operations in *Canada Common Carrier Application*, 26 M.C.C. 563, 565 (1940) the Commission concluded:

> Clearly this [dual operations] cannot be done consistently with the public interest. Not only would it put applicant in a position to prefer by contract any shipper between points now authorized to be served while at the same time charging his full common-carrier rates to others, but equally objectionable, it would enable him by varying his contract-carrier charges to a particular shipper to grant, in effect, a rebate in his common-carrier charges between other points. *We do not imply that any such practices would be indulged, but the mere possibility is enough to preclude the finding of consistency with the public interest required by Section 210.* (emphasis supplied)

In *Block Common Carrier Application*, 49 M.C.C. 651, 654-655 (1949) the Commission articulated its rationale for adopting the "mere possibility of discrimination" standard:

> In our administration of Section 210 of the act, we are charged with carrying out *the clear and unmistakable intent of Congress to preclude the opportunity for discriminating practices* which might well result from the simultaneous holding, by two commonly controlled carriers, of both a certificate and a permit. Where the same shipper is or may be served in both capacities the door is open for objectionable practices even though the operations be wholly different. It is not necessary to point out the many and complex situations, involving substantial injustices to shippers and carriers, which are potentially present when a single carrier, or two commonly controlled carriers, are in a position to offer both common and contract-carrier services within the same territory. Neither is it necessary that we find the actual existence of such discrimination or even a probability thereof. We have consistently held that *the mere possibility of discrimination* warrants our refusal to relax the express prohibition contained in the statute. (Citations omitted) (emphasis supplied).

For a number of years, proceeding under the "mere possibility" test, the Commission remained wary of approving dual operations.[8]

However, by 1977, the Commission had altered its stance and specifically concluded in *Delaware Express Co.* v. *Milford Express, Inc.*, 126 M.C.C. 462, 466 (1977) that "[t]he 'mere potential or opportunity' for discrimination standard is in our view overly restrictive and can in certain circumstances lead to seemingly absurb results." The Commission determined, accordingly, that in future cases it would require, as a reason for denial of dual operating permits, a showing (1) that there existed a likelihood that the applicant would serve the same party both as a common carrier and as a contract carrier and (2) that a *realistic possibility of discrimination* would result from granting the application.[9] At the same time the Commission expressed its continued belief that "[t]he

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[8] Telischak Trucking Inc., Ext.—Concrete Slabs And Beams, 92 M.C.C. 553 (1963); Southern Couriers, Inc., Ext.—Commercial Papers, 94 M.C.C. 111 (1963); Wooten And Parker Ext.—Petroleum, 86 M.C.C. 165 (1961); Lacasse Ext.—Dairy Products, 79 M.C.C. 222 (1959); Indian Head Truck Line, Inc., Ext.—Serv. Station Supplies, 81 M.C.C. 715 (1959); Complete Auto Transit, Inc., Ext.—G.M. Willow Run Plant, 81 M.C.C. 455 (1959).

[9] *See* Clarence L. Werner Ext.—Ripon, WI, 129 M.C.C. 196, (1978); Southwest Equipment Rental, Inc., Ext.—South Gate, 128 M.C.C. 731 (1978); Great Western Trucking Co., Inc., Ext.—Columbus, 128 M.C.C. 721 (1978); Luisi Truck Lines, Inc., Ext.—Eureka, Calif., 128 M.C.C. 760 (1978); Cargo Contract Carrier Corp. Ext.—Bananas, 126 M.C.C. 874 (1977); Wayne Daniel Truck, Inc.—Ext.—Candy, 128 M.C.C. 1 (1977).

determination as to whether a realistic possibility of discrimination will result from a grant of dual operating authority should of course be made on a case-by-case basis." *Delaware Express Co.* at 467.

C. *The Staff Report*

Against this backdrop of Commission precedent, the ICC staff issued a report in July, 1977, entitled "Improving Motor-Carrier Entry Regulation" which dealt with the efficacy of the existing regulations governing the licensing of motor carriers. The staff noted that the report had its genesis in the wide-spread feeling that more competition should be encouraged in the motor transportation industry and that the congested state of the Commission's motor carrier docket should be eased.

With specific reference to dual operations, the staff found that instances of rate discrimination practiced by carriers engaged in dual operations were virtually nonexistent. It therefore recommended that the Commission issue, after appropriate administrative hearings, a general, prospective finding that the holding of dual authority was consistent with the public interest. The staff additionally recommended that the Commission seek the legislative repeal of Section 210.

The Commission issued a notice of proposed rulemaking wherein it highlighted three factors which favored the staff's proposed general finding, *viz.* (1) the presence of Section 218 of the Act, 49 U.S.C. § 318,[10] which gives the Commission disciplinary power over the rates and practices of motor carriers; (2) the desirability of reducing reliance on the entry control mechanism to ensure fair rate practices; and (3) a reduction in the administrative burden in light of the number of motor carrier applications filed annually.

[10] Now codified as 49 U.S.C. § 10704.

The Commission solicited comments from interested parties, and received some 32 responses. The majority of the respondents supported the proposed rule. In particular, the Department of Transportation and the Department of Justice concurred in the staff conclusion that "past implementation of § 210 has resulted in protracted and expensive litigation, yielding inconsistent results, and revealing virtually no instances of discrimination or other abuse." [11]

The rule-making proceeding culminated in the issuance of the final rule contested here, which appears as subpart 1004.3 of Title 49 of the Code of Federal Regulations and reads as follows:

> *Applications involving dual operations*
>
> When the Commission considers applications for motor carrier authority which involve dual operations, it is required by section 210 of the Interstate Commerce Act to find, or to have found, that it would be consistent with the public interest and the national transportation policy for the applicant to hold both common and contract carrier authority. The Commission has concluded that section 210 does not require an individual finding for each application, and it has issued a general finding, effective June 1, 1978, that the holding of both common and contract carrier authority normally is consistent with the public interest and the national transportation policy. Consequently, the Commission will not give individual consideration to this issue in applications involving dual operations, which are filed subsequent to June 1, 1978, unless there is a showing, in the particular case, that rate or service preference

[11] See Comments of the United States Department of Transportation, Joint Appendix at 35 and Comments of the United S[illegible]s Department of Justice, Joint Appendix at 111.

is likely to be extended or other discrimination is likely to be practiced. It will not be sufficient, in order to make such a showing, to establish only that dual service will be provided for the same shipper or consignee. Any grant of authority enabling dual operations will expressly reserve to the Commission the right to impose whatever terms, conditions, or limitations, may be necessary to ensure that applicant's operations conform to section 210 of the Act.

II. The Merits

A. *Congressional Intent*

The petitioners contend that the wording of Section 210 clearly charges the ICC with the responsibility of examining each application for dual operations on an individual basis to determine whether the application is consistent with the public interest and national transportation policy. In other words, the petitioners contend that the Commission is obliged to conduct adjudicatory hearings on each application coming before it and that by issuing the contested general, prospective finding of consistency, in the guise of an exercise of its rule-making power, the ICC has unilaterally removed the requirement of a case-by-case analysis, contrary to Congressional intent.

We assay the validity of the petitioners' arguments against the backdrop of the administrative scheme legislated by Congress for the regulation of the transportation industry. That scheme has been characterized as "uncommon" because it includes "not only a regulatory statute, the Interstate Commerce Act, but also a formal governing body, the Commission, to administer, interpret, and otherwise deal with the Act." [12]

[12] Freight Forwarders Inst. v. United States, I.C.C., 409 F. Supp. 693, 702-703 (N.D. Ill. 1976).

In creating the ICC it was the "fond hope" of Congress that the Commission would "bring to . . . [its] work the expert's familiarity with industry conditions which members of the delegating legislatures cannot be expected to possess" [13] and that "the Commission would exercise its expertise and interpret . . . in future times with an eye toward prevailing conditions in the transportation market." [14]

It has long been recognized that flexibility and adaptability to changing needs are attributes which all administrative agencies should strive to achieve. The Supreme Court has observed that:

> Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile changing economy. They are neither required nor supposed to regulate the present and future within the inflexible limits of yesterday.[15]

To determine whether the Commission has remained "within the limits of the law" as delimited by Section 210, we begin with the well settled principle that in construing statutory language we look first to the wording of the statute [16] and that such wording should be given its plain, obvious and rational meaning.

In our view the language of Section 210 clearly conveys the Congressional concern that motor carriers, operating under dual authority, might engage in various abuses,

[13] American Trucking Assns. v. U.S., 344 U.S. 298, 310 (1952).

[14] Freight Forwarders Inst., *supra* note 12 at 703.

[15] American Trucking v. A., T. & S.F.R. Co., 387 U.S. 397, 416 (1966).

[16] March v. United States, 506 F.2d 1306, 1313 (D.C. Cir. 1974).

most notably rate discrimination. But it is just as clear that Congress delegated to the Commission the task of ensuring that such abuses do not arise. To that end we are persuaded that Congress intended by Section 210 to invest the ICC with broad discretion in the discharge of its delegated responsibilities. Conversely, we do not think that Congress intended to constrain the regulatory agency by prescribing rigid procedural rules.

Our views are not in conflict with the legislative history of Section 210, as embodied in Senator Wheeler's comments *supra*. That history is silent as to the methodology to be employed by the Commission in its monitoring of dual operations, beyond the mere observation that the Commission possesses the power to review *all* cases involving such operations.

Additionally we must take into consideration the ICC's own construction of the statutory language of Section 210, and in that connection we should defer to the ICC's construction if it has a reasonable basis in law.[17] The history of the Commission's interpretation of Section 210 set out in part I.B., *supra*, evidences, in our mind, the agency's continuing adaptation to the contemporary demands of the transportation industry. Rather than the claimed capricious departure from precedent, we find the agency's present interpretation and application of Section 210 to be reasonable and in accord with the intent of Congress.

Finally, we briefly address the propriety of the Commission's proceeding under its rule-making authority as opposed to its adjudicatory power. In so doing we bear in mind Judge Friendly's delineation of the relative merits of each procedure in *WBEN, Inc.* v. *United States*, 396 F.2d 601, 618 (2d Cir. 1968):

[17] *See* Board v. Hearst Publications, 322 U.S. 111, 131 (1944).

> Adjudicatory hearings serve an important function when the agency bases its decision on the peculiar situation of individual parties who know more about this than anyone else. But when, as here, a new policy is based upon general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them [citation omitted].[18]

In different settings regulatory agencies have been permitted to resort to rule-making in lieu of repetitive adjudication where general standards for an entire industry were under consideration.[19] Of particular note is the application of that principle by the three-judge district court in *Chemical Leaman Tank Lines, Inc.* v. *United States*, 368 F.Supp. 925 (D. Del. 1973). In *Leaman* the petitioners challenged the ICC's power to issue a prospective finding of public convenience and necessity relating to the transportation of "waste products" pursuant to 49 U.S.C. § 304(a)(6). Relying principally on the language of 49 U.S.C. §§ 306 and 307,[20] the petitioners argued that the ICC was required to make an individual finding of convenience and necessity on each application for authority to transport waste products. The three-judge court rejected the argument stating:

[18] *See* United States v. Florida East Coast R. Co., 410 U.S. 224 (1973).

[19] Federal Power Comm'n v. Texaco, 377 U.S. 33 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

[20] Section 306 forbids any motor carrier from operating in interstate commerce without a certificate of public convenience and necessity from the Commission. Before issuing such a certificate, Section 307 requires that the Commission find the applicant fit, willing, and able to perform the service proposed and the service itself to be required by present or future public convenience and necessity.

> The plaintiffs believe this language compels the Commission to test independently each application against the yardstick of public convenience and necessity. They would cast on the applicant the burden of proving that he satisfies this standard and forbid the Commission to ease his task by a prospective rule that specified types of service are deemed to serve the public interest.
>
> The plaintiffs, we believe, read too much into Section 206(a)(1). The language of the section does not prescribe when the requisite 'finding' must occur. Nor does it prescribe an exclusive format for making that finding. Without such an unambiguous directive, we can see no reason why the Commission cannot make an advance classification of carriers, 'find' that the public convenience and necessity warrants operations by each carrier encompassed therein, and apply that 'finding' to those individual carriers who show they bear the common attributes of the class.

Similarly, we fail to find any language within Section 210 which prescribes a time when the requisite "finding" of consistency with the public interest must occur, or the method to be used in arriving at such a determination.

We recall Judge Leventhal's conclusion in *American Airlines, Inc.* v. *Civil Aeronautics Board*, 123 U.S. App. 310, 315, 359 F.2d 624, 629 (1966) that:

> rule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and that such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.

We find no such clear Congressional requirement which dictates the procedure the Commission must use to implement Section 210. In its absence, we decline to thwart what we regard as the ICC's legitimate articulation of industry wide standards aimed at the maximum effectuation of Congressional objectives.

B. *The Arbitrary and Capricious Charge*

The "arbitrary and capricious" standard requires a reviewing court to defer to an agency's judgment so long as it has a rational basis.[21]

We have previously listed in part I.C. *supra*, the grounds expressly relied upon by the ICC to justify its prospective general finding. The two grounds of apparently greatest importance are (1) the finding by the ICC staff that rate discrimination as practiced by dual operators is virtually non-existent within the industry and (2) the staff conclusion that Section 218 of the Act provides a more effective method of monitor rate practices and abuses in the industry.

Those findings were echoed in the majority of comments of the parties responding to the Commission's rule making proceedings and the rational nexus between those findings and the Commission's actions has not been undermined by the petitioner's charges.

Nor do we think that the final rule represents a radical departure from the Commission's prior interpretation of Section 210. As we have previously observed, the ICC precedent in this matter reflects a flexible ap-

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[21] Ethyl Corp. v. EPA, 176 U.S. App. D.C. 373, 406-407 & n.74, 541 F.2d 1, 34-35 & n.74, *cert. denied*, 426 U.S. 941 (1976).

proach responsive to the dynamic changes occurring in the transportation industry. The factual findings of those decisions reveal a growing realization of the difficulties related to the Commission's strict application of Section 210, which the final rule attempts to remedy.

C. *The Procedural Due Process Charge*

Lastly, the petitioners argue that the ICC's action will deny them procedural due process in future Commission hearings. They assert that the new rule improperly shifts to them the burden of proof in the agency hearing to show the undesirability of the proposed dual operations.

We disagree because we believe that, while the protestant will have the burden of producing some quantum of evidence as to the potential for abuse by the dual operator, the burden of proof will continue to remain with the applicant to demonstrate that the proposed dual operations will be consistent with the public interest. Thus, we do not agree that the protestants will be saddled with an insurmountable burden in proceedings under Section 210.

III. Conclusion

For the reasons discussed above, the action of the Commission in promulgating subpart 1004.3 of Title 49 of the Code of Federal Regulations is

Affirmed

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

No. 78-1407

American Trucking Associations, Inc.,
Petitioner

v.

United States of America and
Interstate Commerce Commission,
Respondents

Crete Carrier Corporation, Contract Carrier Conference, Cargo Contract Carrier Corporation, Leaseway Transportation Corporation, Whirlpool Corporation, Chromalloy American Corporation, *et al.*,
Intervenors

No. 78-1717

The Atchison, Topeka and Santa Fe Railroad Company, *et al.*,
Petitioners

v.

Interstate Commerce Commission and
United States of America,
Respondents

Chromalloy American Corporation, *et al.*,
Intervenors

PETITIONS FOR REVIEW OF ORDERS OF THE INTERSTATE COMMERCE COMMISSION

BEFORE: TAMM and WILKEY, Circuit Judges, and CORCORAN,* Senior District Judge for the United States District Court for the District of Columbia

JUDGMENT

These causes came on to be heard on petitions for review of an order of the Interstate Commerce Commission and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED, by this Court, that the order of the Interstate Commerce Commission on review herein is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

A true copy:

Test: George A. Fisher
United States Court of Appeals
for the District of Columbia Circuit

By: /s/ [Illegible], Deputy Clerk

Date: June 26, 1979

Opinion for the Court filed by Senior District Judge Corcoran.

APPENDIX C

TITLE 49—TRANSPORTATION

SUBTITLE IV—INTERSTATE COMMERCE

CHAPER 101—GENERAL PROVISIONS

§ 10101. Transportation policy

(a) To ensure the development, coordination, and preservation of a transportation system that meets the needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and in regulating those modes—

(1) to recognize and preserve the inherent advantage of each mode of transportation;

(2) to promote safe, adequate, economical, and efficient transportation;

(3) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(4) to encourage the establishment and maintenance of reasonable rates for transportation without unreasonable discrimination or unfair or destructive competitive practices;

(5) to cooperate with each State and the officials of each State on transportation matters; and

(6) to encourage fair wages and working conditions in the transportation industry.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

* * * *

SUBCHAPTER II—OTHER CARRIERS AND MOTOR CARRIER BROKERS

§ 10921. Requirement for certificate, permit or license

Except as provided in this subchapter or another law, a person may provide transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter II, III, IV of chapter 105 of this title or be a broker for transportation subject to the jurisdiction of the Commission under subchpater II of that chapter, only if the person holds the appropriate certificate, permit, or license issued under this subchapter authorizing the transportation or service.

* * * *

§10922. Certificates of motor and water common carriers

(a) Except as provided in this section and section 10930(a) of this title, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title as a motor common carrier or water common carrier, respectively, if the Commission finds that—

(1) the person is fit, willing, and able—

(A) to provide the transportation to be authorized by the certificate; and

(B) to comply with this subtitle and regulations of the Commission; and

(2) the transportation to be provided under the certificate is or will be required by the present or future public convenience and necessity.

(b) A person must file an application with the Commission for a certificate to provide transportation as a

motor common carrier or water common carrier. The Commission may approve any part of the application or deny the application. The application must—

(1) be under oath;

(2) contain information required by Commission regulations; and

(3) be served on persons designated by the Commission.

(c)(1) Subject to section 10927(a) of this title, each certificate issued to a person to provide transportation as a motor common carrier shall specify—

(A) the transportation to be provided by the carrier;

(B) any of the regular routes over which any of the places between which, and off-route places at which, the carrier may provide transportation; and

(C) if transportation is not over regular routes or between specified places, the area in which the carrier may provide transportation.

(2) Under regulations of the Commission, a motor common carrier may occasionally deviate from the regular routes, or the places specified in the certificate, or both.

(3) If a motor common carrier transports passengers, the Commission may authorize transportation of the passengers only over a regular route and between specified places, except to the extent the carrier is authorized to provide special or charter transportation.

(4) A certificate of a motor common carrier to transport passengers may include authority to transport—

(A) newspapers, baggage of passengers, express, or mail in the same motor vehicle with the passengers; and

(B) baggage of passengers in a separate motor vehicle.

(d) Each certificate issued to a person to provide transportation as a water common carrier shall specify each route over which, and each port between which the carrier may provide transportation.

(e) (1) A motor common carrier may provide transportation under a certificate only if the carrier complies with conditions the Commission finds are required by public convenience and necessity, including conditions—

(A) on extending routes of the carrier; and

(B) to carry out requirements established by the Commission under this subtitle.

(2) The Commission may prescribe necessary conditions under which a water common carrier provides transportation, including conditions on extending routes of the carrier.

(3) The Commission may prescribe conditions when the certificate is issued and at any time thereafter. The Commission may not prescribe a condition preventing—

(A) a motor common carrier or water common carrier from adding to its equipment and facilities or its transportation within the scope of the certificate to satisfy business development and public demand; or

(B) a water common carrier, if the carrier has authority to provide transportation over completed parts of a waterway project authorized under law, from extending its transportation over the uncompleted parts of the project when opened for navigation to satisfy business development and public demand.

(f) (1) A certificate issued under this section does not confer a proprietary or exclusive right to use the public highways or public waterways.

* * * *

§ 10930. Limitations or certificates and permits

(a) Except when the Interstate Commerce Commission finds good cause consistent with the public interest and the transportation policy of section 10101 of this title—

(1) a person may not hold both a certificate of a motor common carrier and a permit of a motor contract carrier issued under this subchapter, or both a certificate of a water common carrier and a permit of a water contract carrier issued under this subchapter, to transport property over the same route or in the same area; and

(2) if a person controls, is controlled by, or is

(A) one of them may hold a certificate of a motor common carrier, while the other holds a permit of a motor contract carrier, to transport property over the same route or in the same area; and

(B) one of them may not hold a certificate of a water common carrier, while the other holds a permit of a water contract carrier, to transport property over the same route or in the same area.

(b) (1) A person may not hold a permit of a freight forwarder issued under this subchapter if the person is a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I, II, or III of chapter 105 of this title.

(2) Except for motor vehicle transportation subject to the jurisdiction of the Commission under subchapter

IV of chapter 105 of this title by section 10523(a)(2) of this title, a permit may not authorize a freight forwarder to conduct direct rail, water, or motor carrier transportation subject to the jurisdiction of the Commission under subchapter I, II, or III of that chapter.

(3) Except when the Commission finds that service to be provided as a freight forwarder is consistent with the public interest and the transportation policy of section 10101 of this title, a person may not hold a permit of a freight forwarder when—

(A) the principal business of the person is manufacturing and selling, or buying and selling, or both manufacturing and selling and buying and selling articles or commodities, and the service of a freight forwarder (or similar assembling, consolidating, and shipping service is provided by the person for its own business) is commonly used to transport the articles or commodities; or

(B) the person controls, is controlled by, or is under common control with, a person referred to in clause (A) of this paragraph.

* * * *

§ 10704. Authority and criteria: rates, classifications, rules, and practices prescribed by Interstate Commerce Commission

(a)(1) When the Interstate Commerce Commission, after a full hearing, decides that a rate charged or collected by a carrier for transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, or that a classification, rule, or practice of that carrier, does or will violate this subtitle, the Commission may prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed. The Commission may order the carrier to stop the violation. When a rate, classification, rule, or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate and shall adopt the classification and observe the rule or practice prescribed by the Commission.

The Commission shall maintain standards and procedures for establishing revenue levels for rail carriers providing transportation subject to its jurisdiction under that subchapter that are adequate, under honest, economical, and efficient management, to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business. The Commission shall make an adequate and continuing effort to assist those carriers in attaining revenue levels prescribed under this paragraph. However, a rate, classification, rule, or practice of a rail carrier may be maintained at a particular level to protect the traffic of another carrier or mode of transportation only if the Commission finds that the rate or classification, or rule or practice related to it, reduces or would reduce the going concern value of the carrier charging the rate. Revenue levels established under this paragraph should—

(A) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation; and

(B) attract and retain capital in amounts adequate to provide a sound transportation system in the United States.

(b)(1) When the Commission decides that a rate charged or collected by—

(A) a motor common carrier for providing transportation subject to its jurisdiction under subchapter

II of chapter 105 of this title by itself, with another motor common carrier, with a rail, express, or water common carrier, or any of them;

(B) a water common carrier for providing transportation subject to its jurisdiction under subchapter III of chapter 105 of this title; or

(C) a freight forwarder for providing service subject to its jurisdiction under subchapter IV of chapter 105 of this title;

or that a classification, rule, or practice of that carrier, does or will violate this chapter, the Commission shall prescribe the rate (including a maximum or minimum rate, or both), classification rule, or practice to be followed.

(2) When prescribing a rate, classification, rule, or practice for transportation or service by common carriers other than by rail carrier, the Commission shall consider, among other factors, the following:

(A) the effect of the prescribed rate, classification, rule, or practice on the movement of traffic by that carrier; and

(B) the need for revenues that are sufficient, under honest, economical, and efficient management, to let the carrier provide that transportation or service.

(3) If the carrier is a motor or water common carrier or a freight forwarder, the Commission shall also consider the need, in the public interest, or adequate and efficient transportation or service by that carrier at the lowest cost consistent with providing that transportation or service.

(4) If the carrier is a motor common carrier or a freight forwarder, the Commission shall also consider the inherent advantages of transportation by motor common carrier or the inherent nature of freight forwarding, respectively.

(c) (1) When the Commission finds that a minimum rate of a contract carrier for transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title, or a rule or practice related to the rate or the value of the service under it, violates this chapter or the transportation policy of section 10101 of this title, the Commission may prescribe the minimum rate, rule, or practice for the carrier that is desirable in the public interest and will promote that policy. In prescribing the rate, the Commission may not give a motor or water contract carrier an advantage or preference in competition with a motor or water common carrier, respectively, if an advantage or preference is unreasonable or inconsistent with the public interest and the transportation policy of section 10101 of this title.

(2) When prescribing a minimum rate, or rule or practice related to a rate, for a contract carrier, the Commission shall consider—

(A) the cost of the transportation provided by the carrier; and

(B) the effect of a prescribed minimum rate, or rule or practice, on the movement of traffic by that carrier.

(d) In a proceeding involving competition between carriers of different modes of transportation subject to this subtitle, except rail carriers, the Commission, in determining whether a rate is less than a reasonable minimum rate, shall consider the facts and circumstances involved in moving the traffic by the mode of carrier to which the rate is applicable. Subject to the transportation policy of section 10101 of this title, rates of a carrier may not be maintained at a particular level to protect the traffic of another mode of transportation.

(e) In a proceeding involving a proposed increase or decrease in rail carrier rates, the Commission shall spe-

cifically consider allegations that the increase or decrease would (1) change the rate relationships between commodities, ports, places, regions, areas, or other particular descriptions of traffic (without regard to previous Commission consideration or approval of those relationships), and (2) have a significant adverse effect on the competitive position of shippers or consignees served by the rail carrier proposing the increase or decrease. The Commission shall investigate to determine whether the change or effect violates this subtitle when it finds that those allegations are substantially supported on the record. The investigation may be made either before or after the proposed increase or decrease becomes effective and either in that proceeding or in another proceeding.

(f) The Commission may begin a proceeding under this section on its own initiative or on complaint. A complaint under subsection (a) of this section must be made under section 11701 of this title, but the proceeding may also be in extension of a complaint pending before the Commission. A complaint under subsection (c) of this section must contain a full statement of the facts and the reasons for the complaint and must be made under oath.

* * * *

§ 10328. Intervention

(a) Designated representatives of employees of a carrier may intervene and be heard in a proceeding arising under this subtitle that affects those employees.

(b) Under regulations of the Interstate Commerce Commission, reasonable notice of, and an opportunity to intervene and participate in, a proceeding under this subtitle related to transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title that is, or is proposed to be, provided in a State shall be given to interested persons and to the authority of that State having jurisdiction to regulate

transportation by motor vehicles in intrastate commerce on the highways of that State, or, if there is no such authority, to the chief executive officer of the State.

Title 5

Administrative Procedures Act

§ 554. Adjudications

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

Title 28

Supreme Court Jurisdiction

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Code of Federal Regulations

CHAPTER 49

§ 1004.3 Applications involving dual operations.

When the Commission considers applications for motor carrier authority which involve dual operations, it is required by section 210 of the Interstate Commerce Act to find, or to have found, that it would be consistent with the public interest and the national transportation policy for the applicant to hold both common and contract carrier authority. The Commission has concluded that section 210 does not require an individual finding for each application, and it has issued a general finding, effective June 1, 1978, that the holding of both common and contract carrier authority normally is consistent with the public interest and the national transportation policy. Consequently, the Commission will not give individual consideration to this issue in applications involving dual operations, which are filed subsequent to June 1, 1978, unless there is a showing, in the particular case, that rate or service preference is likely to be extended or other discrimination is likely to be practiced. It will not be sufficient, in order to make such a showing, to establish only that dual services will be provided for the same shipper or consignee. Any grant of authority enabling dual operations will expressly reserve to the Commission the right to impose whatever terms, conditions, or limitations, may be necessary to ensure that the applicant's operations conform to section 10 of the Act.

This rule is promulgated under the authority contained in 49 U.S.C. 304 and 310, and 5 U.S.C. 553 and 559, and was adopted formally at a General Session of the Interstate Commerce Commission held at its office in Washington, D.C. on the 24th day of March, 1978.

APPENDIX D

[7035-01]

INTERSTATE COMMERCE COMMISSION

[49 CFR Part 1004]

[Ex Parte No. 55 (Sub-No. 27)]

DUAL OPERATIONS OF MOTOR CARRIERS

Proposed Implementation of Proposal No. 18 Regarding the Handling of Motor Carrier Applications

AGENCY: Interstate Commerce Commission.

ACTION: Proposed rulemaking.

SUMMARY: This notice proposes to implement the recommendations of ICC proposal No. 18 (Dual Operations) in the report of the Commission's Staff Task Force on improving motor carrier entry control, dated July 6, 1977, regarding handling of motor carrier applications which, if granted, will result in dual operations as both a common and a contract carrier. It is anticipated that the decision in this proceeding will approve future dual operations. Guidelines would be established by which dual operations may be brought in issue in a specific case.

DATES: Written comments should be filed with the Commission on or before December 12, 1977.

ADDRESSES: Send comments to Office of Proceedings, Interstate Commerce Commission, Washington, D.C. 20423.

FOR FURTHER INFORAMTION CONTACT:

Michael Erenberg, Assistant Deputy Director, Section of Operating Rights, Office of Proceedings, In-

terstate Commerce Commission, Washington, D.C. 20423; Phone: 202-275-7292.

SUPPLEMENTARY INFORMATION: Section 210 of the Interstate Commerce Act requires that dual operations be approved as a condition to any new grant of authority to a carrier, or affiliated carriers holding both common and contract carrier rights. Approval may be granted if dual operations satisfy the standard of consistency with the public interest and the national transportation policy. Heretofore, evaluation of compliance with the requirements of section 210 has been on a case-by-case basis. As motor carrier operations continue to expand and diversify reflecting growth and technological changes in the economy, applications to operate contemporaneously in both the common and contract mode have increased dramatically. To facilitate disposition of these cases and improve agency resource allocation, recommendation No. 18 of the Staff Task Force report proposes that in a proceeding analogous to a prospective licensing rulemaking, the Commission enter a general finding that the holding of dual authority satisfies the standard of section 210 absent a specific showing that abuses are likely to result. Also, it advocates submission of legislation ultimately repealing the considered statutory provision in light of the availability of sanctions set forth in section 218(b) of the Act.

The hypothesis on which the above recommendation rests is that instances of rate discrimination or other abuses traceable to the holding of dual authority are virtually nonexistent. If no practical or legal impediments are shown to exist, it is anticipated that the decision in this proceeding will prospectively approve dual operations as has been proposed. Concurrently, guidelines would be established by which the propriety of dual operations may be brought in issue in a specific case. To insure the viability of the general finding of consistency with the public interest the proposed guidelines impose affirmative burdens on any party advocating disapproval of dual operations.

DATES: Written comments should be filed with the Commission on or before December 12, 1977. Comments are requested from interested parties concerning the question of whether discrimination or preference is likely where dual operations exist under current economic and regulatory conditions. These comments should also address the issue of whether alternate means exist to dispose of dual operations proposals more expeditiously, and they may include suggested rules regarding the type of showing required to compel an assessment of dual operations in a specific proceeding.

Section 210 of the Act provides in pertinent part that:

> Unless, for good cause shown, the Commission shall find, or shall have found, that both a certificate and permit may be so held consistently with the public interest and the national transportation policy * * * (1) no person * * * shall hold a certificate * * *, if such person * * * holds a permit as a contract carrier authorizing operation for the transportation of property by motor vehicle over the same route or within the same territory; and (2) no person, * * *, shall hold a permit * * *, if such person holds a certificate * * * for the transportation of property * * * over the same route or within the same territory (49 U.S.C. 310, August 9, 1935, amended September 18, 1940).

Decisions of the Commission interpreting this section of the Act have, until recently, taken an increasingly strict view of when dual operations may be approved. Results, however, have not been uniform even in relatively similar factual settings, and much time and energy has been devoted to an often highly theoretical analysis

of whether unlawful or undesirable practices could be indulged in if dual operations approval were to be granted. Since such efforts are unrelated to the evaluation of the issue of public need in application proceedings, the public interest should be greatly advanced by our reducing the amount of resources devoted to disposing of such peripheral matters. It is axiomatic that any regulation adopted in this proceeding must be consistent with the requirements of the Act and carry out its objectives. Accordingly, brief consideration is warranted at this point of the meaning and purpose of section 210, as they are currently understood.

Historical Development of Standards Relating to Disposition of Dual Operations Proposals

It is well established that at the time of the adoption of the Motor Carrier Act of 1935, its supporters were not favorably disposed to concurrent motor carrier operations as both a common and contract carrier. Their concern was that such operations would enable the exercise of preference, discrimination, and other undesirable practices. An earlier bill from which the Act was ultimately derived even went so far as to prohibit dual operations entirely. There is no legislative history which would indicate that the drafters considered the adoption of the language appearing above, which allow the Commission to approve dual operations on making certain findings, to be a significant departure from their original proposal.

Provisions of section 210 have remained relatively unchanged since their enactment (the only major change has been the bringing of common control within the scope of this rule in 1940); however, the Commission's approach to evaluating applications subject to its terms has varied through the years. In the initial stages of motor carrier regulation the Commission demonstrated

considerable leniency in approving dual operations, basing such findings solely on disparity of commodities and territories, if present. After 1940, however, this agency became concerned that the relationship of the parties involved could give rise to opportunities for the exercise of preference or discrimination regardless of other factors in a case. This trend began with the entry of the decision in *Canada Common Carrier Application*, 26 M.C.C. 563 (1940), wherein it was concluded that the "mere possibility" that improper practices could occur was enough to warrant disapproval of dual operations. Thereafter service proposals were frequently disapproved not only where dual service could clearly be provided for the same shipper, but even where there was only a remote change that the same person would be served as both common and contract carrier. Ultimately, in *Zern-Purchase-Nettles*, 57 M.C.C. 627 (1951), possible overlapping service for merely the same consignee was found a sufficient ground on which to base a determination that dual operations would not be in the public interest.

The adoption of the standard in the *Canada* case did not result in the denial of all subsequently filed applications seeking to engage in dual service. Frequently, where a remote chance of dual service was found, it was possible to restrict the scope of the involved common carrier service, or to limit the involved contract carrier application, to satisfy whatever objections may have existed with regard to an outright grant of the service proposal in question. Also, in certain specified classes of cases, such as those involving proposals to transport cash letter, or to perform small parcel service, dual operations were approved even though under existing standards and precedent such operations would have been considered not in the public interest. On the whole, though, the trend became established to disapprove operations as both a common and contract carrier in as many

situations as possible, and on the most theoretical of bases.

The "mere possibility" approach to analysis of applications subject to section 210 was followed with relative consistency until the entry of the decision in *Delaware Express Co.* v. *Milford Express, Inc.*, 119 M.C.C. 499 (1973) (*Delaware I*). In this proceeding it was found that under the circumstances presented, no reasonable likelihood existed that dual operations by commonly controlled carriers to the same consignees would violate the considered statutory provision or be contrary to the public interest. Subsequently, in a report on reconsideration in the same case, printed at 126 M.C.C. 462 (1977) (*Delaware II*), Division I rejected the "mere potential or opportunity" standard as overly restrictive. It then ruled that where there does not exist a "realistic possibility" of discrimination as a result of a grant of dual operating authority, such operations should be found consistent with the public interest and the national transportation policy. The subsequent evaluation of facts in *Delaware II* fairly supports the conclusion that in only rare instances of so-called consignee overlap will dual operations approval be withheld. See also *Cargo Contract Carrier Corp. Ext.—Bananas*, 126 M.C.C. 874, 876-880 (1977), and *Wayne Daniel Truck, Inc.—Ext.—Candy*, 128 M.C.C. 1, 9-10 (1977).

After the second *Delaware* decision, Division I in *Chapter Exp., Inc., Ext.—Truck and Trailer Parts*, 126 M.C.C. 671 (1977), adopted the position that a more realistic evaluation of facts is necessary in all proceedings which could result in multimodal motor carrier operations. Factors or criteria alluded to in *Delaware II* were found suitable for appraisal of applications seeking dual operations approval, and the prior, speculative approach to resolution of the considered issue was substantially rejected. Since these decisions are of recent vintage, it

is not possible to state with any certainty their effect on dual operations. Because of the emphasis on reasonable analysis and concern for real world effects, it is anticipated that approval will be granted with somewhat greater frequency than before.

Purpose and Need For Present Rulemaking

If a rule such as the Staff Task Force contemplates were adopted, disapproval of dual operations should occur only infrequently. It is recognized that such liberalization would be contrary to views held at the time the Motor Carrier Act was adopted. This is not felt to be an impediment to implementation of the considered proposal, however, for several reasons. The first is that when Congress revised section 210 in 1940 to extend it to common control situations, no other efforts were made to tighten its provisions, even though dual operations were being routinely approved at that time. An even more significant consideration is the fact that in 1940, present section 218(b) ws added to the Act, affording the Commission disciplinary power with respect to the rates and practices of contract carriers. This grant of regulatory power should have obviated the concern of the drafters of the Act that rebates and concessions could be offered by a contract carrier as a means of including use of its common carrier service. If abuses of dual operations grants were to occur, the latter cited statutory section, and others prohibiting unlawful practices by common carriers remain available to enable the Commission to bring about their termination and protect the public interest. A side benefit would be a reduction in reliance on the entry control mechanism to ensure lawful, fair and competitive rate practices.

The proposal would eliminate in most instances the need to address the issue of dual operations in individual proceedings, which remains necessary even under the

Charter—Delaware II line of decisions. Because of the startling increase in motor carrier application filings during 1977, we believe any suggestion to reduce the time for handling cases warrants investigation, not only to ease the burden on the agency's staff, but more importantly because more responsive regulatory action will result.

COMMENTS REQUESTED

Comments are requested from interested parties concerning the question of whether discrimination or preference is likely where dual operations exist under current economic and regulatory conditions. These comments should also address the issue of whether alternate means exist to dispose of dual operations proposals more expeditiously, and they may include suggested rules regarding the type of showing required to compel an assessment of dual operations in a specific proceeding.

Accordingly, the Commission proposes to add to part 1004 of the Code of Federal Regulations a new § 1004.3, as follows:

§ 1004.3 [Added]

(a) Where an application for motor common or contract carrier authority will result in dual operations as defined in section 210 of the Interstate Commerce Act, a finding will be entered that "in accordance with the decision in Ex Parte No. 55 (Sub-No. 27) dual operations may be performed by applicant (and its affiliate) consistent with the public interest and the national transportation policy." Consideration will not otherwise be afforded the dual operations issue in any particular proceeding unless a party introduces facts indicating a reasonable likelihood that rate preferences will be extended or that discrimination will be practiced or solicited. To satisfy this requirement will not be sufficient for a party advocating litigation of the lawfulness of dual operations

to merely establish that dual service may or will be provided for the same shipper or consignee.

(b) Where the question of whether dual operations would be consistent with the public interest and national transportation policy is raised in a specific proceeding, the party raising the issue should address the following relevant factors: (1) Identification of shippers to be served as both a common and contract carrier, (2) the relationships of the involved commodities, (3) the realities of economic control of the shippers over the carriers, (4) the economic leverage which any potential consignors or consignees would have on the carriers, (5) the actual incentive which the involved carrier or carriers would have to engage in discriminatory behavior, and (6) the actual product distribution patterns of the traffic involved.

(c) Any grant of authority enabling dual operations by an applicant (or by an applicant and its affiliate) will include a condition expressly reserving to the Commission the right to impose such terms, conditions, or limitations in the future as it may find necessary to insure that the applicant's operations shall conform to section 210 of the Act.

This notice of initiation of a rulemaking is promulgated under the authority contained in 49 U.S.C. 304 and 310, and 5 U.S.C. 553 and 599, and was adopted formally at a General Session of the Interstate Commerce Commission held at its office in Washington, D.C., on the 3d day of October, 1977.

By the Commission (Commissioner Brown did not participate).

H. G. HOMME, Jr.,
Acting Secretary.

[FR Doc. 77-29717 Filed 10-7-77; 8:45 am]

[7035-01]

CHAPTER X—INTERSTATE COMMERCE COMMISSION

SUBCHAPTER A—GENERAL RULES AND REGULATIONS

[Ex Parte No. 55 (Sub-No. 27)]

PART 1004—ADMINISTRATIVE INTERPRETATIONS—STATEMENTS OF POLICY

Dual Operations

AGENCY: Interstate Commerce Commission.

ACTION: Final rule.

SUMMARY: The Commission is issuing a general finding that the holding of both common and contract carrier authority is consistent with the public interest and the national transportation policy. The new rule refers to this finding and provides that, as a result, the Commission will no longer consider the dual operations issue in applications for common or contract carrier operating authority unless there is a showing that rate or service preference is likely to be extended or that other discrimination is likely to be practiced. The new rule is expected to remove artificial barriers to the seeking and obtaining of operating authority and to speed the handling of cases involving dual operations.

EFFECTICE DATE: June 1, 1978.

FOR FURTHER INFORMATION CONTACT:

Michael Erenberg, phone 202-275,7292.

SUPPLEMENTARY INFORMATION: By a notice served October 11, 1977 (42 FR 54843), the Commission proposed new regulations designed to implement par-

tially Recommendation 18 of the staff task force report issued July 6, 1977. The task force recommended that the Commission seek repeal of section 210 of the Interstate Commerce Act (the Act), which requires that, when the Commission considers applications for motor carrier authority which involve dual operations, it must find that it would be consistent with the public interest and the national transportation policy for the carrier, or affiliated carriers, to hold both common and contract carrier rights. Pending repeal of section 210, the task force recommended that the Commission issue a general finding that the holding of dual authority is consistent with the public interest, absent a finding that abuses are likely to result. The proposed regulations provided that, in proceedings involving dual operations, the Commission would enter a finding that the dual operations were consistent with the public interest and the national transportation policy unless a party introduced facts indicating a reasonable likelihood that rate preference would be extended to discrimination practiced. In addition, the regulations identified factors to be addresesd by parties interested in showing the likelihood of rate preference or discrimination.

The Commission invited interested parties to comment on the proposed rules, and 32 parties respondent. (A list identifying the participants will be made available upon request.) Contract carriers, Government agencies, and carriers, performing dual operations generally supported adoption of the proposed rules. Shipper interests tended to support the rules in the belief that they would reduce regulatory delays and eliminate unnecessary complications; however, several shipper interests stated that the regulations should contain additional safeguards against rate and service discrimination. A labor organization voiced concern that adoption of the proposed regulations might create opportunities for carriers to evade

their statutorily recognized responsibilities to their employees. Most regular and irregular route common carriers and their trade associations opposed the rules in whole or in part.

After reviewing the comments, the Commission has concluded that it should issue a general finding that the holding of both contract and common carrier authority normally is consistent with the public interest and the national transportation policy and that some non-substantive changes should be made in the regulations proposed October 11, 1977. As, a result, proposed § 1004.3(a) and (c) have been combined into one paragraph which refers to the general finding made in this proceeding and indicates that, after June 1, 1978, the Commission will not consider the dual operations issue unless there is a showing in a particular case, that rate or service preference is likely to be extended or other discrimination practiced. Proposed § 1004.3(b) has been eliminated, in the belief that it is not necessary.

Some of the comments in opposition to the proposed regulations raised issues which are also relevant to the regulation which we are adopting. These issues, and the Commission's responses to them, are discussed in the following paragraphs.

Some opponents contend that the proposed rules violate the letter and the spirit of section 210 of the Act. They argue that Congress did not favor the contemporaneous holding of common and contract carrier rights and framed section 210 accordingly.

We do not believe that a literal reading of section 210 requires that the lawfulness of dual operations be evaluated on a case-by-case basis. That section allows the holding of dual authority if "* * * for good cause shown, the Commission shall find, or *shall have found,* (emphasis supplied) that both a certificate and a permit may be so held consistently with the public interest and the national transportation policy in this Act * * *." The

language clearly justifies a previous finding and does not require that that finding be made in each individual case.

Nor do we believe that the adoption of regulations such as those proposed is inconsistent with Congressional intent. The notice which opened this proceeding addressed this argument and noted that conditions have changed since 1935, when section 210 was adopted; that Congress did not take advantage of an opportunity to tighten the provisions of section 210 in 1940, at a time when dual operations were being routinely approved; and that, even more significantly, in 1940 present section 218(b) was added to the Act, which gave the Commission authority to regulate the rates and practices of contract carriers. We conclude that this grant of authority shauld have obviated any concern of the drafters of the Act that rebates and concessions could be offered by a contract carrier as a means of inducing use of its common carrier service. It was also noted that, in recent decisions, the Commission has held that where there does not exist a "realistic opportunity" of discrimination as a result of a grant of dual operating authority, such operations should be found consistent with the public interest and the national transportation policy. (See 42 FR 54845.)

Another argument presented by opponents is that the proposed rules would shift the burden of proof from the applicants to the protestants with regard to the question whether the transaction is consistent with the public interest. They argue that, under section 210, the applicant must bear the burden of establishing affirmatively that approval of the application will be in the public interest, but that, under the proposed rules, the burden is shifted to protestants who must show a reasonable likelihood that approval of the application would not be in the public interest.

We do not believe that the new regulation will shift the burden of proof since the applicant will still bear the burden of proving that approval of its application would be in the public interest in any case where that question is raised. The effect of the rule is to limit the Commission's case-by-case consideration of the issue to those situations in which it can be shown that there is a reasonable likelihood of injury to the person raising the issue, or to the public generally, through the granting of rate or service prefeernce or other forms of discrimination.

Some of the participants opposed the regulations on the grounds that they would blur the distinction between common and contract carriage, adversely affecting the stability of the industry. We do not believe that such a blurring could take place given the present statutory and regulatory framework. The Commission's general finding that the holding of both common and contract carrier authority normally is consistent with the public interest and the national transportation policy will not lessen in any way the tests which must be met by a carrier seeking either type of authority. Contract carriers seeking to expand their common carrier operations will still have to demonstrate a public need for their service and comply with stringent rules requiring the performance of non-discriminatory service. Common carriers seeking contract carrier rights will still have to meet the definition of contract carrier found in section 203(a)(15) of the Act.

The opposition of many participants was based on the belief that implementation of the proposed regulations would result in widespread abuses and unfair practices, such as soliciting or granting preferential rate treatment, and that, because of the workload of the Commission's rate-reviewing staff there is little likelihood that these unfair practices would be detected. Some of the participants suggested that certain modifications should be made

in the proposed regulations to ensure that these unfair practices do not result. For example, the Cargo Contract Carrier Corp. and the Contract Carrier Conference of the American Trucking Associations, Inc., proposed that in each application the Commission should consider whether an applicant has in the past sought or granted preferential or discriminatory treatment because of dual operations capabilities. Groendyke Transport, Inc., Matlock, Inc., and the American Trucking Associations, Inc., suggested that the regulations be reworded to require specific litigation of the dual opperations issue where a grant would result in service for the same shipper as both a common and contract carrier. The National Small Shipments Traffic Conference, the Drug and Toilet Preparation Traffic Conference and the Gift Wrappings and Tyings Association suggested several modifications in the regulations including: (1) Requiring the filing of rates and contracts along with applications for contract carrier permits, (2) tightening accounting rules to prevent unfair shifting of contract carrier costs to common carrier service, (3) logging, or flagging for particular attention, contract rates filed by dual operations carriers, and (4) providing for the investigation of contract rates of dual carriers when they fall below a specified percentage of applicable common carrier rates. They would also have the rules adopted only on an interim basis, after which this proceeding would be reopened and the rules re-evaluated.

We do not believe that it is necessary to adopt any of these suggestions at the present time. We are fully aware that there are abuses which could result from implementation of the policy which is being formally adopted in this proceeding. However, we would point out that the policy is not really new. A similar policy has been followed by the Commission in cases involving dual operations during the past year, and the abuses feared have not materialized. In this regard, it should be stressed

that this policy, since it is being implemented by a rulemaking proceeding, can quickly be reversed or modified if abuses develop. The Commission will remain vigilant and ready to take action should it be necessary. Furthermore, the rule that we are adopting expressly reserves to the Commission the right to impose, in any individual case, whatever terms conditions, or limitations may be necessary to ensure that the applicant's operations conform to section 210 of the Act.

In summary, the Commission has concluded that the regulation adopted in this proceeding is a reasonable response to problems previously experienced by carriers seeking dual operations approval; that it will remove artificial barriers to the seeking and obtaining of operating authority; that it will contribute markedly to the objective of speeding up the handling of cases involving dual operations; and that is should eliminate instances where undesirable service restrictions are imposed or cancellations of unrelated operating rights are required.

FINDINGS

We find that Part 1004 of Subchapter A of Chapter X of Title 49 of the Code of Federal Regulations should be amended by the addition of new § 1004.3, as set forth below; that the new rule is reasonable and necessary; that the holding by a motor carrier, or affiliated carriers, of authority to operate both as a common and a contract carrier normally is consistent with the public interest and the national transportation policy and does not need to be considered in applications involving dual operations unless there is a showing that rate or service preference is likely to be extended or other discrimination is likely to be practiced; and that this decision, which is designed to expedite the handling of applications where dual operations are involved, is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Accordingly, 49 CFR is revised by the addition of a new § 1004.3, which will read as follows:

§ 1004.3 Applications involving dual operations.

When the Commission considers applications for motor carrier authority which involve dual operations, it is required by section 210 of the Interstate Commerce Act to find, or to have found, that it would be consistent with the public interest and the national transportation policy for the applicant to hold both common and contract carrier authority. The Commission has concluded that section 210 does not require an individual finding for each application, and it has issued a general finding, effective June 1, 1978, that the holding of both common and contract carrier authority normally is consistent with the public interest and the national transportation policy. Consequently, the Commission will not give individual consideration to this issue in applications involving dual operations, which are filed subsequent to June 1, 1978, unless there is a showing, in the particular case, that rate or service preference is likely to be extended or other discrimination is likely to be practiced. It will not be sufficient, in order to make such a showing, to establish only that dual services will be provided for the same shipper or consignee. Any grant of authority enabling dual operations will expressly reserve to the Commission the right to impose whatever terms, conditions, or limitations, may be necessary to ensure that the applicant's operations conform to section 210 of the Act.

This rule is promulgated under the authority contained in 49 U.S.C. 304 and 310, and 5 U.S.C. 553 and 559, and was adopted formally at a General Session of the Interstate Commerce Commission held at its office in Washington, D.C. on the 24th day of March, 1978.

Commissioner Murphy, dissenting

Section 210 of the Act was designed to prevent discrimination from being made possible. It is not neces-

sary that discriminatory practices be shown to actually exist. The result of the adoption of these final rules would, in my opinion, be the practical elimination of dual operations as a factor to be considered in application proceedings, and the virtual abandonment of our responsibilities under Section 210. Until such time as section 210 is repealed, if ever, the Commission has a responsibility to enforce that section.

In an application for motor common carrier operating authority where there is an apparent dual operations conflict, applicant has the burden of establishing not only that it has met its burden of proof with respect to public convenience and necessity and fitness *but also* that it has satisfactorily met its burden under section 210. The final rules would shift this burden of proof by requiring an opposing party to show that preferences are likely to be extended or discrimination is likely to be practiced. One wonders how an opposing party can meet the burden of showing a rate preference when it is considered that contracts of contract carriers are not open to public scrutiny. In my opinion, an applicant is in a better position than an opposing party to address the issue of its own dual operations, and should be required to do so.

I also believe that it is improper to impose upon the Commission, with its limited resources and ever-increasing workload, the burden of resolving dual operations problems after a certificate has been issued. Discriminatory practices arising out of dual operations are often extremely difficult to detect. Since there is an extremely large volume of contract carrier rate schedules filed with the Commission each year, the likelihood of detecting discriminatory rate proposals is remote. In my opinion, there is no substitute for a careful initial scrutiny of an application presenting dual operations problems.

For these reasons, I respectfully dissent.

Commissioner Stafford, dissenting

The Commission's action today effectively overrules Congress's intent, expressed in section 210 of the Act itself and more clearly in the legislative history, and reaffirmed by us in a letter to Senator Hartke as recently as June 1976.

The Congressional policy was expressed in the following statement of Senator Wheeler, Chairman of the Senate Committee on Interstate and Foreign Commerce:

> This section prohibits any person from holding at the same time a common carrier certificate and contract carrier permit, unless for good cause shown the Commission finds that both may be held consistently with the public interest and with the policy declared in section 202(a). There are instances in which both types of operations can advantageously be conducted by the same operator and without prejudice to the public interest, but the possibility of abuses developing makes it advisable to give the Commission the power to pass on all cases in which it is proposed to combine the two types of operations. 79 Cong. Rec. 5654 (1935).

This statement by Senator Wheeler evidences two Congressional objectives. First, dual operations is not favored, and should be approved only in the unusual case. Second, Congress wanted to make sure that the Commission would decide dual operations matters on a case-by-case basis. The Congressional purpose was to protect against certain discriminations and special treatment. Essentially, Congress was concerned that regulated carriers and the shipping public needed protection from the possible discrimination which might ensue if a motor carrier were allowed to hold itself out to perform two different types of service—common and contract—at two different levels of rates for the same shippers on a par-

ticular route or in a particular territory. Competing carriers and competing shippers could suffer from such preferential treatment. At the same time, Congress recognized that dual operations did not always present possibilities for abuse, and thus conferred upon the Commission the authority to determine in every case whether dual operations would be consistent with the public interest.

The majority's action here completely frustrates and disregards both of the Congressional objectives noted above. Henceforth, dual operations will be presumed to be acceptable, unless certain facts are established. The possibility of ever proving these facts in a particular case is so remote as to render section 210 a nullity. Second, dual operations will not be handled on a case-by-case basis.

In my view, current case law on the subject offers an appropriate statement about dual operations. It recognizes that not only should special preferences be avoided, but even *the opportunity* to offer special treatment must be avoided. However, the opportunity must be reasonably realistic, and cannot be remote or hypothetical. *See Cargo Contract Carrier Corp. Ext.—Bananas*, 126 M.C.C. 874 (1977); *Delaware Express Co.* v. *Milford Express, Inc.*, 126 M.C.C. 462 (1977).

The proposed rule would appear to be marginally acceptable if some changes were made to conform to current case law. First, authority to serve the same shipper as both a common and contract carrier is the specific evil that section 210 is designed to prevent. Nevertheless, the proposed rule would not find such service objectionable without certain specific information. Any general finding should exclude such service. Second, the only party who really has full access to the facts is the applicant. The applicant, therefore should be required to show that a realistic opportunity for special treatment

will not exist. This can be done by adding an appropriate question to the Commission's OP-OR-9 application form. I do not view the answering of a question on the application as imposing an unreasonable burden on any party.

Lastly, to give competitors reasonable notice that dual operations is involved, a simple statement should continue to be included (where appropriate) in the FEDERAL REGISTER notice.

In summary, I believe the majority's action is contrary to clearly enunciated Congressional intent. Furthermore, while I have some doubts about its lawfulness (primarily the failure to handle dual operations on a case-by-case basis), I believe a rule that incorporates current case law could be acceptable.

H. G. HOMME, JR.,
Acting Secretary.

[FR Doc. 78-9304 Filed 4-6-78; 8:45 am]

Supreme Court, U. S.
FILED
NOV 9 1979
MICHAEL RODAK, JR., CLERK

No. 79-510

In the Supreme Court of the United States

OCTOBER TERM, 1979

AMERICAN TRUCKING ASSOCIATIONS, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

The judgment of the court of appeals in this case was entered on June 26, 1979 (Pet. App. 17a-18a). Petitioner did not obtain an extension of time within which to file a petition for a writ of certiorari. The time provided by 28 U.S.C. 2101(c) within which to file a petition therefore expired on September 24, 1979. The petition was not filed until September 26, 1979. The time provided by Section

2101(c) is jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942). It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[1]

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1979

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[1]On October 4, 1979, petitioner filed a "Motion to Accept Late Filed Petition For Writ of Certiorari," asserting only that counsel miscalculated the length of the 90-day period. This Court's Rules do not provide for any such motion; Rule 34(2) provides that any application for an extension of time within which to file a petition for a writ of certiorari "must be presented to the clerk within the period sought to be extended."

DOJ-1979-11

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-510

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioners,

v.

THE UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 15, 1979

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-510

AMERICAN TRUCKING ASSOCIATIONS, INC.,

Petitioners,

v.

THE UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Can the Interstate Commerce Commission adopt a general rule codifying a policy it is already applying on a case-by-case basis, or is it forced to continue considering the issue in each case on an individual basis?

2. Does the involved rule violate the applicable statute?

3. Is the involved rule rational?

4. Does the involved rule abridge the due process rights of opposing parties?

STATEMENT OF THE CASE

Generally, the respondents represented herein are satisfied with petitioner's statement of the case and find no need to restate it. Two areas contained therein, however, require further comment:

1. On page 4 of its petition, petitioner states that "the Commission had always recognized its statutory obligations to review the circumstances of each application. . . ." To the extent that petitioner implies that each application must be fully litigated on the dual operations issue on a case-by-case basis, we disagree. First, we can find no case support for the notion of a statutory obligation to review each case individually. (Petitioner refers us to none.) Second, we do not believe any statute compels a case-by-case analysis. Finally, since the Commission is admittedly seeking to change its past practice, the simple fact that it acted in a certain manner in the past cannot be construed to prove the legal necessity of acting in that manner.

2. On pages 4 and 5 of the petition, petitioner states that the Commission's notice of proposed rulemaking[1] "anticipated that the Commission's adoption of the proposal would result in approval of future dual operations . . . which otherwise would not have been approved." Such "anticipation" appears nowhere in the notice. Moreover, the statement is incorrect. The involved rule has the effect of codifying current I.C.C. policy.[2] As

[1] Appendix D to Petition, pp. 31a-39a.

[2] This case law is expressed in a line of cases beginning with Delaware Express Co. v. Milford Express, Inc., 119 M.C.C. 499 (1973), and continuing in Delaware Express Co. v. Milford Express, Inc., 126 M.C.C. 462 (1977) and Charter Express, Inc. - Extension-Truck and Trailer Parts, 126 M.C.C. 671 (1977).

such, its only effect on the current handling of cases will be procedural in nature – streamlining processing and avoiding unnecessary litigation. The rule does not involve any further substantive changes.

ARGUMENT IN OPPOSITION TO THE GRANTING OF THE PETITION

The thrust of petitioner's argument for certiorari is its contention that the involved rule, and the D.C. Circuit's decision thereon, significantly alters future I.C.C. actions. Since the policy underlying the rule under review is already in force – and since it has been in force for at least two (2) years – the issue here is not really whether the policy will be followed,[3] but whether it will be followed on a slow, case-by-case basis or through the more streamlined approach which results from the implementation of the new rule. Certainly, that issue does not require the attention of this Court.

1. Petitioner seeks to draw a distinction between the instant case and *Chemical Leaman Tank Lines, Inc. v. United States*, 368 F. Supp. 925 (D. Del. 1973). The D.C. Circuit attached significance to the *Chemical Leaman* decision and, in particular, to the court's conclusion allowing the Commission to act through rulemaking in lieu of adjudication. While petitioner attempts to distinguish *Chemical Leaman* factually, it must be noted that the importance of that case derives from its legal underpinnings, rather than from its factual similarity.

[3] It is noteworthy that petitioner, while seemingly attacking the substance of the involved rule, fails to disclose any appeals of case-by-case analyses predicated on the very policy reflected in the involved rule. Presumably, if petitioner was concerned with the substance of the Commission's decision, it would have manifested that concern in one of the adjudicatory proceedings dealing therewith.

This Court has viewed rulemaking as a valid and indeed desirable way for agencies to resolve issues where the agency's expertise leads it to general findings with regard to the issues. In *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), this Court approved the F.C.C.'s application of a general rule to specific cases without the necessity of an adjudicatory hearing. The holding in *Storer* was premised on the fact that, in the Commission's judgment, there was no valid basis for such a hearing. The Court said that Congress did not intend for the agency to "waste time" on such applications. 351 U.S. at 205.

Similarly, in *FPC v. Texaco, Inc.*, 377 U.S. 33, this Court held that a rulemaking was appropriate and that statutory hearing requirements did not "preclude the Commission from particularizing statutory standards through the rulemaking process and barring at the threshold those who . . . [did not] show reasons why in the public interest the rule should be waived." 377 U.S. at 39. The intent of this Court's holdings in *Storer* and *Texaco* has been viewed as broad. Certainly there has been no limitation of the nature suggested by petitioner. *See, e.g., American Telephone & Telegraph Co. v. FCC*, 572 F.2d 17 (2nd Cir.), *cert. denied* 439 U.S. 875 (1978); *Thompson Van Lines, Inc. v. United States*, 399 F. Supp. 1131 (D.D.C. 1975), *aff'd* 423 U.S. 1041 (1976); *Upjohn Co. v. Finch*, 422 F.2d 944 (6th Cir. 1970). *See also Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973).

Here, moreover, the rule involved does not preclude any party from raising the issue of dual operations. Instead, it merely adopts a procedure which minimizes unnecessary litigation in a situation in which the Commission's policy generally does not justify a lengthy, formal proceeding. Nonetheless, when a formal proceeding on the dual operations issue is warranted, it is still available.

Petitioner suggests that rulemaking is only appropriate where "all the requirements of the section [of the statute] are met." (Petition, at 8). There is no such requirement. Rulemaking is intended to offer agencies an efficient means of satisfying their mandates. If the Commission finds dual operations to be in the public interest generally, a rule to that effect allows the agency to avoid unnecessary hearings on the question. At the same time, it still provides an opportunity for a hearing when an exception to the general rule is involved. This constitutes a means of handling Commission business in a fashion that is both orderly and efficient.[4] It is also an effective, indeed ideal, use of rulemaking for the reasons envisioned in *Storer* and *Texaco*.

2. Petitioner raises the question of the Commission's statutory authority for the involved rule, but never addresses itself to the issue in its petition. Notably, petitioner has discarded its interpretation of the legislative history of the dual operations provision of the statute, upon which it relied so heavily below. On page 10 of the petition, petitioner asserts that "Congress clearly intended the granting of such [dual operation] rights to be an *exception*. . . ." (emphasis in original). Nowhere does it provide support for such a notion, however, In fact, as the court found below, Congress certainly did not intend to shackle the Commission. Rather, it sought to invest it with "broad discretion in the discharge of its delegated responsibilities." (Appendix A to Petition, page 12a.) Consequently, the Commission's action here does not raise a substantial issue as to its statutory authority to act.

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[4] This Court's holding in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), affirms rulemakings intended to accomplish such results. 435 U.S. at 543-544.

3. On the issue of the rationality of the involved rule, petitioner once again raises a question and fails to address it in the body of its petition. It appears from pages 9 and 10 of the petition that petitioner's complaint derives from the source of the Commission's findings underlying the rule in question (the Commission's staff). It never articulates what nexus it feels is missing; it merely trifles with the weight attached to evidence considered by the Commission. Not only is such an issue unworthy of this Court's attention, but it is beyond the scope of judicial review in any event. *See United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972).

4. Petitioner's final point misconstrues the nature and intent of the involved rule. What petitioner seeks is to have the Commission's pre-*Delaware Express* policy reinstated. Under the current policy, dual operations are generally in the public interest. Before, dual operators had to prove that dual operations were not contrary to the public interest. This case involves the question of whether a specific finding must be made in each case or whether such a finding can be made by rule. In either case, what an opposing party must show to ultimately prevail is identical. As such, no due process issue is realistically before the Court.

CONCLUSION AND PRAYER

WHEREFORE, respondents represented herein pray that the petition be denied and for such other and further relief as the Court deems proper in these premises.

Respectfully submitted,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENTS LEASEWAY TRANSPORTATION CORPORATION, CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., CRETE CARRIER CORPORATION AND WHIRLPOOL CORPORATION

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STATEMENT OF THE CASE

The Interstate Commerce Commission is an independent regulatory body charged by Congress with carrying out the provisions of the Interstate Commerce Act. *See* 49 U.S.C. §§10301, 10321. One of those provisions generally proscribes dual operations by motor carriers, *i.e.* the holding of both a certificate of a motor common carrier and a permit of a motor contract carrier to transport property over the same route or in the same area, but permits dual oper-

ations when the Commission finds good cause consistent with the public interest and the national transportation policy. 49 U.S.C. §10930. Congress has amended or revised this provision several times since its enactment in 1935, *see* Pub. L. No. 74-255, 49 Stat. 554 (1935); Pub. L. No. 76-785, 54 Stat. 919, 923 (1940); Pub. L. No. 95-473, 92 Stat. 1415 (1978), and the Commission has adjusted its interpretation of the statute over the years to conform to these changes as well as to the evolution of the motor carrier industry. *See, e.g., Luper Transp. Co. Contract Carrier Application,* 9 M.C.C. 451 (1938); *Block Common Carrier Application,* 49 M.C.C. 651, 655 (1940); *Delaware Express Co. v. Milford Express, Inc.,* 119 M.C.C. 499 (1973); *Delaware Express Co. v. Milford Express, Inc.,* 126 M.C.C. 462 (1977). The rule challenged by petitioners and upheld by the court below is a further development in the Commission's interpretation and enforcement of this statute.

The rule, which revised 49 C.F.R. by adding a new subpart 1004.3, was promulgated by the Commission on April 6, 1978, pursuant to its authority under 49 U.S.C. §§10321 and 10930, and 5 U.S.C. §§553 and 559, after serving notice of the proposed rule in the Federal Register (42 Fed. Reg. 54843, October 11, 1977) and inviting interested parties to submit comments. The new rule provides that in applications in which a motor carrier seeks dual operations authority the Commission will no longer give *individual* consideration to whether such authority is consistent with the public interest and the national transportation policy, unless there is a showing in a particular case that rate or service preference is likely to be extended or other discrimination is likely to be practiced. Appendix D, at 40a of Petition for Certiorari.

The Court of Appeals for the District of Columbia Circuit rejected petitioners' challenge to the rule. The court

found first that the rule was not inconsistent with congressional intent. Although Congress expressed certain concerns with regard to motor carriers operating as both contract and common carriers, it "delegated to the Commission the task of ensuring" that potential abuses do not arise, and invested the Commission "with broad discretion in the discharge of its delegated responsibilities." Appendix A, at 12a of Petition for Certiorari. The court also found that the Commission's use of its rulemaking authority was proper. *Id.* at 13a-15a. Second, the court found that the rule has a rational basis since, among other reasons, rate discrimination by dual operators is virtually nonexistent, and other sections of the Interstate Commerce Act provide a more effective method by which the Commission may prevent dual operations abuse. *Id.* at 15a. Finally, the court held that the rule did not deny petitioners procedural due process in future Commission hearings by improperly shifting the burden of proof. *Id.* at 16a.

REASONS FOR DENYING THE PETITION

The Petition Must be Denied Because It is Untimely

The judgment of the Court of Appeals for the District of Columbia Circuit affirming the order of the Interstate Commerce Commission was filed on June 26, 1979. Appendix B, at 18a of Petition for Certiorari. 28 U.S.C. §2101(c) provides that "any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be . . . applied for within ninety days after the entry of such judgment or decree." Consequently, the petition for certiorari in the present action was required by statute to have been filed on or before September 24, 1979. However, it was not filed until September 26, 1979, and therefore must be denied because it is out of time.

Recognizing that the petition was filed out of time, petitioners have now filed a "motion to accept late filed petition for writ of certiorari." [1] This motion should not be considered. First, the motion was filed after the deadline for filing the petition had expired. Rule 34(2) of the Rules of this Court provides that an application seeking an extension of time in which to file a petition for certiorari "must be presented to the clerk within the period sought to be extended." [2] Consequently, the motion was not properly filed under the Rules of the Court.

Second, and of equal importance, is the policy that these respondents perceive to underlie Rule 34(2). The 90-day period for filing a petition for certiorari is a lengthy one. While that may be appropriate for the difficulty of deciding whether to seek review in this Court and of drafting an adequate petition for certiorari, the prevailing party and the court of appeals are entitled to know by the end of it what are the intentions of the losing party with respect to possible further review by this Court. The procedure now dictated by Rule 34(2) serves that purpose. Under the Rule a losing party *must*, by the end of the 90-day period, either have filed his petition or sought leave for an extension of time to do so.

[1] Counsel for these respondents were not served with this motion as required by Rule 34(3) of the Rules of this Court, and obtained a copy of the motion from the petitioners only after learning by chance from counsel for the Commission that the motion had been filed.

[2] Rule 34(2) also provides that a motion for extension of time in which to file a petition for certiorari shall be submitted at least ten days before the expiration of the period sought to be extended, and will not be granted except in the most extraordinary circumstances if filed during the last ten days of the period. Not only did petitioners not file their motion for extension of time within ten days before the date on which the petition was due, but they offered "no other excuse for the late filing" than a "miscalculation in determining the length of the 90-day period." Motion, at 2. This excuse would not have been adequate even if the motion had been filed on time, and cannot justify the late filing of the petition.

This imposes judicial finality on cases litigated in the courts of appeals and affords certainty and repose to the parties. If these petitioners' motion were granted — indeed, if this Court ever were to grant a motion for extension filed after the 90-day period had ended — then a party that had prevailed in the court of appeals would be required to wait the additional 60 days permitted by 28 U.S.C. §2101, or a total of 150 days, rather than merely 90 days, before knowing to a certainty whether this Court would entertain an attempt by the losing party to seek review of the decision of the court of appeals. This would be a most serious infringement on prevailing parties' rights of repose, and is certainly not warranted by the facts surrounding petitioners' failure to file a timely petition for certiorari. Consequently, the motion to accept the late filed petition must be denied.

CONCLUSION

For the foregoing reasons, respondents request that the petition for a writ of certiorari be denied.

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